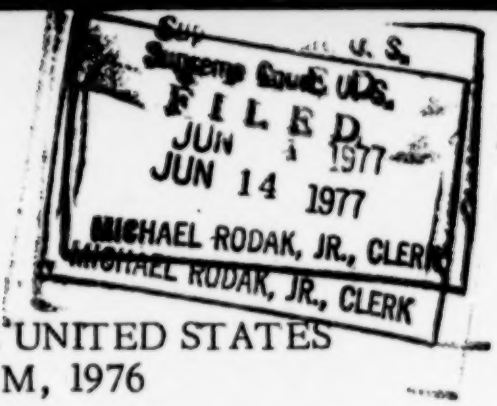

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-1784

THOMAS MUSTO and MICHAEL ASTARITA,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

EVSEROFF & SONENSHINE
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Members of the Bar of the Supreme
Court of the United States

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ARGUMENT 6

POINT ONE

The lower court violated the petitioners constitutional rights when it denied them a hearing upon their motion to controvert an eavesdropping warrant.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No _____

THOMAS MUSTO and MICHAEL ASTARITA,

Petitioners,

-against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered in the above entitled matter on January 31, 1977.

A. OPINION BELOW

The trial Court rendered two opinions below which are the subject of the instant proceeding. The first thereof was rendered by Mr. Justice Burton Roberts on December 8, 1975, wherein the original motion to controvert and suppress was denied. Said opinion (not officially reported) is appended to this petition as Appendix A.

Thereafter, a motion for reconsideration of the original motion was granted at which time the court adhered to it's original determination. This opinion (not officially reported), is appended hereto as Appendix B.

No opinion was rendered by the Appellate Court which unanimously affirmed the judgment below without opinion on January 31, 1977. That Court's order of affirmation of conviction is appended hereto as Appendix C.

No opinion was rendered by the New York Court of Appeals since that court denied permission to appeal to that court by its certificate dated March 16, 1977. A copy thereof is appended to this petition as Appendix D.

B. THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment sought to be reviewed herein is the judgment of the Appellate Division, First Judicial Department of the Supreme Court of the State of New York, made on January 31, 1977 and appended hereto as Appendix C.

Jurisdiction in this Court is invoked under Title 28, United States Code, Section 1257 (2) and Rule 19, subdivision 1 of the rules of this Court.

C. THE QUESTIONS PRESENTED FOR REVIEW

The trial court erred in refusing to grant a hearing upon defense counsel's request for a motion

to controvert the eavesdropping orders because of prejurious statements in the underlying affidavits submitted in support of said orders.

D. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved are New York Criminal Procedure Law, § 710.10, 710.20, 710.40 and 710.60 and Amendments IV and XIV of the United States Constitution and Article 1, § 6 of the New York State Constitution.

The pertinent portions are set forth in Appendix E of this petition.

E. A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

Petitioners were convicted on April 28, 1976, upon their pre-trial plea of guilty to Promoting Gambling in the First Degree and Promoting Gambling

in the Second Degree before the Honorable Justice Roberts in the New York State Supreme Court, County of New York.

Prior to the entry of the plea of guilty extensive pretrial motions were made before Mr. Justice Roberts upon motions to controvert various eavesdropping warrants issued out of the Supreme Court of the State of New York, County of New York to suppress evidence of the conversations intercepted pursuant to said warrants. The warrants authorized both telephonic interception and "bugging" of oral communications.

The trial court denied each and every motion seeking to controvert the eavesdropping orders without granting the petitioners a hearing on the issues asserted.

Thereafter, all of these materials were the subject of a timely appeal to the Appellate Division, First Department of the Supreme Court of the State of New York. That Court, on January 31, 1977, unanimously

affirmed the judgment below without opinion. Thereafter, a timely application was made to the New York Court of Appeals seeking leave to Appeal to that Court. On March 16, 1977, the Honorable Justice Fuchsberg, an Associate Justice of the Court of Appeals denied permission to appeal to that Court.

Petitioners are presently incarcerated pursuant to said judgment of conviction.

F. THE STATES OF THE PROCEEDINGS IN WHICH THE ISSUES INVOLVED WERE RAISED AND THE MANNER IN WHICH THEY WERE RAISED.

The issue with respect to the validity of the eavesdropping warrants were raised by timely pretrial motions in accordance with the Criminal Procedure Law of the State of New York.

G. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(See next Page)

POINT ONE

THE LOWER COURT VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS WHEN IT DENIED THEM A HEARING UPON THEIR MOTION TO CONTROVERT AN EAVES-DROPPING WARRANT

The petitioners by way of motions dated March 28, 1975 and September 25, 1975, sought to controvert a court ordered eavesdrop which resulted in the incerception of their conversations. It was the contention of petitioners that the affidavits submitted in support of said order contained perjurious allegations without which the orders would not have been granted. The court in a decision dated December 8, 1975, denied petitioners motion without a hearing holding that a sufficient factual basis had not been alleged to warrant a hearing.

The law in the State of New York pertaining to when a hearing on a motion to suppress or controvert should be granted is of somewhat recent vintage. The New York Court of Appeals on October 21, 1965, in the case of People v. Alfinito, 16 N.Y. 2d 181, 264 N.Y.S. 2d, 243, 211 N.E 2d 644, stated at page 245, 246;

> " There is no controlling authority in this State although perhaps People ex rel. Robert Simpson Co. v. Kempner (208 N.Y. 16, 23, 101 N.E. 794, 796, 46 L.R.A., N.S., 970) can be read as authorizing a later contest of the facts which were

' before the Magistrate when he signed the warrant. In other jusri-dictions there are decisions both ways. Some say that there is no authority for going behind the war-rant (Johnson v. State 163 Tex. Cr. Rep. 101, 289 S.W. 2d 249; Armstrong v. State, 195, Miss. 300, 15 So. 2d 438; Burrell v. State. 207 Md. 278. 113 A. 2d 884; United States v. Burnett, Cir., 53 F. 2d 219, 225; Kenney v. United States, 81 U.S. App. D.C. 259, 157 F. 2d 442). Holdings or suggesting the contrary are such decisions as United States v. Nagle, 2 Cir., 34 F. 2d 952 and Kings v. United States, 4. Cir., 282 F 2d 398. In Rugendorg v. United States, 376, U.S. 528, 532, 84 S. Ct. 825, 827, 11 L. Ed. 2d 887, the Supreme Court seems to assume although not to hold, that such an attack on the underlying affidavit may be made Our comparatively new statutes (Code Crim. Proc., §§ 813-c, 813-d, 813-e, which set up procedures for motions for the return of property and suppressin of evidence alleged to have been obtained by unlawful search and seizure, do not speci-fically answer our question since their rather general language as to "unlawful search and seizure" and "property claimed to have been "unlawfully obtained: does not tell us whether it was intended to permit, on such a motion, a new inquiry into the facts set out in the affidavit for the search warrant.

****

"We hold as follows: first, that § 813-c of the Code of Criminal Procedure is to to construed so as to permit an inquiry as to whether the affidavit's statements were perjurious; second, that the burden of proof is on the person attacking the warrant (see United States v. Goodwin, 9 Cir., 1 F 2d 36; United States v. Napela, 2 Cir., 28 F. 2d 898), and third, that any fair doubt arising from the testimony at the suppressal hearing as to whether the affidavit's allegations were perjurious should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing a warrant."

The Peoples position was and still is that a hearing in a case such as this is only required when a defendant attacks the veracity of the affiant and not where the credibility of the source of the information is challenged. In support of this proposition the People cited to the State Appellate Courts the Alfinito decision and subsequent decisions such as People v. Slaughter, 37 N.Y. 2d 596 (1975); People v. Glen, 30 N.Y. 2d 252 (1972), cert.den. 409 U.S. 849, (1972) and People v. Solimine, 18 N.Y. 2d 477 (1966). The imposition of a standard such as this effectively precludes a defendant from satisfactorily attacking an affiant when his information and knowledge is based upon conversations with another.

In the instant matter the affiant was Ronald Goldstock, an assistant district attorney in the New York County District Attorney's

Office. Mr. Goldstock submitted his affidavit to the Lower Court in support of his application for an eavesdropping warrant wherein he sought to set forth sufficient probable cause for the issuance of said order. A reading of said affidavit indicates that Mr. Goldstock's facts were based upon conversations he had with other parties and not upon his personal knowledge. The petitioners could not challenge the veracity of the affiant because his affidavit was in all respects, truthful as far as he was concerned. The proper challenge must be to the facts and the source of the facts when one is alleging perjury and not to the individual who is merely reciting them.

The language of the New York Court of Appeals in each of the aforementioned decisions leaves little doubt that the permissable scope of when a hearing is authorized is so narrow that it infringes upon an accused's constitutional rights as guaranteed by the Fourteenth and Fourth Amendments of the United States Constitution. The Court held in said cases as follows:

> ."The detective's statement in this case asserted that a named informer, then confined in prison near the courthouse had told the officer that defendant, acting in concert with the informer, did burglarize certain business premises and did take a calculating machine and a barometer therefrom. The informer further stated that the machine and the barometer, as well as a pistol, were then in the unlawful possession of the

' defendant. According to the affidavit the named informer also stated that the items were located either at the home of the defendant, in his automobile or at his place of business, all of which were explicitly described by the informer and verified by the detective. Apart from general denials of the allegations made in the detective's affidavit, defendant avers that the aforementioned affidavit was based " entirely upon the hearsay statement of a confessed thief".

It is plain from a reading of defendant Solimine's affidavit that he is not attacking the veracity of the affiant detective, but rather the credibility of the named informer who was in prison. The only objection to the detective's affidavit is in connection with the source of the information contained therein, i. e. a confessed thief of the very articles for which the search warrant was issued. Otherwise Solimine's affidavit is barren of any facts which raise an issue respecting perjury. To warrant the relief requested, Solimine must throw doubt upon the truthfulness of the affiant's allegations. This he has failed to do". " Emphasis Added")

(PEOPLE v. SCLIMINE 18 N.Y. 2d 477, 479, 480, [1966])

* * * * * * * * * * * * *

" The March motion was properly denied without a hearing. Before a hearing is required an issue of fact

"must be raised (People v. Solimine, 18 N.Y. 2d 477, 276 N.Y.S. 2d. 882, 223 N.E. 2d 341). Generally, the burden on a motion to suppress is on a defendant (People v. Berrios, 28 N.Y. 2d 361, 367, 321 N.Y.S 2d 884, 888, 270 N. E 2d 709, 712; People v. Alfinito, 16 N.Y. 2d 181, 264 N.Y.S. 2d 243, 256, 211 N.E. 2d 644, 646). The affidavits of Glen and his counsel do not dispute the facts in the warrant application, the veracity of the affiant, or the manner in which the property was seized. On the narrow question of law whether the affidavit in support on the warrant was sufficient, the motion was, therefore, correctly decided. "

(PEOPLE V. GLEN, 30 N.Y. 2d, 252, 262, [1973]

* * * * * * * * * * * * * * *

" As we held in People v. Solimine (18 N.Y. 2d 477, 276 N.Y.S. 2d 882, 223 N.E. 2d 341), a defendant is entitled to a hearing in which he may challenge the truthfulness of the allegations in the affidavit supporting a search warrant only where he attacks the veracity of the police officer affiant, and not where, as here, the credibility of the source of information is challenged (People v. Solimine, 18 N.Y. 2d 477, 479, 276 N.Y. S. 2d 882, 883, 223, N.E. 2d 341, supra). Alfinito is only available to a defendant

" who claims that the affiant has perjured himself".

(PEOPLE v. SLAUGHTER)
37 N.Y. 2d 596, 600 [1975]

It is thus apparent that prosecutors throughout the State of New York can easily thwart any effort by an accused to challenge a Court Order by having the underlying affidavit drawn by a third party who merely recites the hearsay allegations of another.

The Court Order in question at this time is one signed by the Honorable Burton B. Roberts, Justice of the Supreme Court of the State of New York, County of New York, on September 26, 1973 and designated number 73/72. As previously indicated the affidavit submitted in support of the application for an eavesdrop was in the name of an assistant district attorney. The one substantive assertion in said affidavit which induced the Court to grant the order was that detailing an alleged conversation between Michael Astarita and an undercover police officer. The assertion in question stated:

" A police officer, sheild # 21590, who is currently acting in an undercover capacity has informed me that during the course of his official duties he has had occasion to meet Michael Astarita, and has been taken into his confidence with respect to his illegal gambling activities. Astarita told the officer early in September 1973, that he (Astarita) was about to operate a wire-

' room using a telephonic set-up which was designed to insulate him from the a action of law enforcement agencies. According to Astarita the set-up involves the use of two telephones which while located in apartment 2-B of 324 East 84th Street, New York City, are officially listed in Telephone Company records as having been installed in another premises. Thus, Astarita notes, should any investigating agency learn of the numbers 472-2990 and 472-2452, that would have been given to his customers to call and place their wagers, the agency would still be unable to discover the location of the wireroom, and seize the bookmaking records. I am further informed by the undercover police officer that Astarita disclosed that for bookmaking purposes, he maintained a third telephone in the wireroom (correctly listed) which would be used for outgoing calls, and the number of which would not be made available to customers."

The New York County District Attorney's Office conceded during argument before the Honorable Jacob Fuchsberg, Associate Justice of the New York State Court of Appeals, at which time leave to appeal to the New York Court of Appeals was being sought that without said allegation the Court order could not have been legally issued.

It was this specific allegation that was challenged by the petitioners as being perjurious. The moving papers which sought to controvert the orders stated the following:

" It is submitted that the conversation that the undercover police officer related to Mr. Goldstock never did take place and that if infact said officer did have any information, it was not as a result of any conversation with Michael Astarita. These allegations by the undercover police officer are based upon information and belief, investigation and conversations with the defendant perjurious, in that they did not infact take place. If in fact, said allegations were perjurious, there was insufficient probable cause to warrant the interception of conversations of Michael Astarita".

The Court in ruling that said allegation was insufficient held that "Facile statements by counsel, the source of which is enshrouded in claims of 'information and belief' and 'investigation' do not properly raise the perjury issue for a hearing (People v. Gilligan, 80 Misc. 2d 423, 427; People v. Childers, 54, Misc. 2d 1065, 1070)." What the Court neglected to consider was the statement that said facts were based upon conversations with the defendant wherein he denied having the conversation set forth in Mr. Goldstock's affidavit. What stronger factual statement could be presented than denial of the conversation to which it was alleged that the petitioner was a party.

In People v. Gilligan (supra) a case in which a warrant was attacked and a hearing sought based upon an alleged perjurious affidavit, defense counsel sought to show that it was incredible for a police

officer to state that he smelled the odor of marijuana. Concededly, this was mere conjecture by counsel and was not supported by any factual allegation. As the Court stated at page 765:

> " No facts are set forth, but only the belief of defendants' attorneys that the statement of the Tuscon officer that he smelled the odor of marijuana was incredible.... "

In People v. McDonough, supra, it was held at page 13, that:

> " However this Court is of the opinion that once an accused has been furnished with a copy of the order and affidavit, he must say more than ' I want a hearing' or' the statements in the affidavit are perjurious. ' The defendant's affidavit in support of a motion challenging a wiretap or eavesdrop must allege what statements were perjurious. "

Thus, it is evident that the aforementioned cases cited by the Court in its decision denying a hearing upon the question of perjurious statements wholly support petitioners position that a hearing should have been granted. The assertions in the defense motion were not mere supposition or conjecture but were based upon a denial of the petitioner Astarita that the alleged conversation took place. What better factual basis can be set forth than a denial by an alleged participant in a conversation that it took place.

All of the aforementioned cases used by the lower Courts to bolster its position in denying petitioners a hearing on the perjury issue when compared to the factual basis set forth in the defense moving papers do just the opposite and mandate that a hearing be held. The lower Courts thus erred in denying petitioners a hearing upon their application on either ground, to wit; that the moving papers failed to assert a factual basis sufficient to warrant a hearing or that a hearing is unwarranted in the instant case because the veracity of the affiant is not being challenged.

The unnecessarily restrictive nature of New York case law places an unconscionable burden upon an accused thus violating his constitutional rights. There must be a relaxing of the present standards so that an accused can be afforded a fair opportunity to establish an infringement upon his own constitutional rights.

CONCLUSION

THE PETITION FOR CERTIORARI HEREIN SHOULD BE GRANTED

Dated: Brooklyn, New York
June , 1977

Respectfully submitted,

EVSEROFF & SONENSHINE
Attorneys for Petitioner

WILLIAM SONENSHINE, ESQ.
Of Counsel

APPENDIX A

SUPREME COURT NEW YORK COUNTY
TRIAL TERM PART 34

THE PEOPLE OF THE STATE OF NEW YORK

-against-

THOMAS MUSTO and MICHAEL ASTARITA,

Defendants

Indictment No. 4072/1974

BURTON B. ROBERTS, J.:

Defendant's motion directed to various aspects of the wiretapping in this case, which were returnable March 23, 1975 and September 25, 1975, are consolidated for decision.

Defendants have jointly moved for the following relief:

A. Suppression of evidence derived from wiretapping upon the grounds that the initial eavesdropping order, No 73/72, is not based upon sufficient probable cause to justify interception of the defendant Musto's conversations.

B. Controversion of the eavesdropping orders and suppression of the fruits thereof upon the grounds that an affidavit in support of the aforementioned order contains perjurious statements.

C. Suppression of evidence derived from wiretapping upon the grounds that certain Federal eaves-

dropping orders, from which the wiretapping in the instant case was allegedly derived, were based upon an insufficient showing of the necessity for eavesdropping.

The foregoing are decided as follows:

A. Sufficiency of the Probable Cause

The Fourth Amendment, as it relates to eavesdropping, requires probable cause to believe that a particular described person has committed, is committing or is about to commit a specific "designated offense" and that particularly described conversations constituting evidence of such offense will be obtained through electronic surveillance at the location where the eavesdropping is to occur (Berger v. New York, 388 U.S. 41; CPL § 700.15). When the crime under investigation involves bookmaking, this requirement is satisfied when the facts alleged in support of the eavesdropping order warrant a man of reasonable caution to believe that named individuals are accepting bets over the subject telephones. (People v. Gnozzo, 31 N.Y. 2d 134).

There is no challenge here to the sufficiency of the probable cause for the order in question as regards to the defendant Astarita. Briefly summarized, the supporting affidavits, dated Septemver 26, 1973, allege that in early September, 1973, Astarita, a known bookmaker with three of nine prior gambling arrests for the operation of telephone 'wirerooms' in Manhattan confided to an undercover officer of his plan to open another such establishment utilizing the premises and telephones which are the subject of the order. It is further alleged that on September 19 and 21, 1973, police officers monitoring a separate bookmaking wiretap overheard the subjects of that investigation call the telephone numbers which are the subject of the instant order and place "lay-of" bets

with two individuals, one of whom was referred to as "Michael"

The only contention raised by the defense is that there was insufficient probable cause to make the defendant Musto a subject of eavesdropping. Musto, the suppprting affidavit allege, was also a known bookmaker and a known associate of Astarita-- of Musto's four prior arrests for operating wirerooms, two occurred with Astarita. It is further alleged that on September 24, 1973, Musto was observed by the police leaving the subject premises at 2:06 p. m., a time alleged to be "precisely at the close of the bookmaking hours. Finally, it is alleged that the other individual who was overheard on the separate wiretap accepting lay-off bets over the subject telephone on September 19 and 21 along with "Michael", was named "Tommy". From the foregoing, it is clear that although the allegations pertaining to Astarita are stronger, probable cause did exist to believe that Musto was again Astarita's co-conspirator in the operation of this wireroom. Indeed, even if the allegations against Musto did not amount to probable cause, I would hold that the interception of his conversations was justified under the co-conspirator principle announced in United States v. Kahn (415 U.S.143). This branch of defendant's motion is therefore denied.

B. Allegations of Perjury

The right of a defendant to attack allegations in a warrant as perjurious is now elementary (People v. Alfinito, 16 N.Y.2d 181). Equally basic is the proposition that to obtain a hearing on the issue of perjury the defense, which has the burden of proof, must allege facts which throw doubt upon the veracity of the allegations in support of the warrant (People v. Glen, 30 N.Y. 2d 252; People v. Solomine, 18 N.Y. 2d 477; CPL § 710.60).

The defendant's sole basis for the motion to controvert here is contained in a statement in an affirmation by their counsel. Referring to the conversation summarized heretofore in which Astarita is alleged to have told an undercover police officer the wireroom location and telephone numbers, counsel states: "These allegations by the undercover police officer are based upon information and belief, investigation and conversations with the defendant, perjurious, in that they did not in fact take place".

The foregoing statement is not a sufficient factual basis upon which to predicate a hearing. It is, in fact, not factual at all. Facile statements by counsel, the source of which is enshrouded in claims of "information and belief" and "investigation" do not properly raise the perjury issue for a hearing. (People v. Gilligan, 80 Misc 2d 423, 427; People v. Childers, 54 Misc, 2d 752, 753 People v. McDonough, 51 Misc 2d 1070). Defendant's motion to controvert the warrant is therefore denied.

C. The Necessity to Eavesdrop

The Supreme Court in Berger v. New York (supra), held that the nature of eavesdropping requires a showing of ""special facts" or "exigent circumstances" which neccessitate the use of this tool of law enforcement. The statutory embodiment of this principle in both Federal and New York State law is the requirement of a showing that normal investigative procedures have been tried and failed, or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ (18 U.S.C. § 2518, subd. 3c; CPL § 700.15, subd. 4). The defense does not challenge the sufficiency of the series of wiretap orders directly involved herein on this basis. However, the defense does contend that a series of Federal eavesdropping orders, to which the

defendant Musto concededly has standing to object, was the source of the separate wiretap (referred to above) over which lay-off bets to "Michael" and "Tommy" were overheard, and that this Federal wiretap did not contain a showing of the requisite necessity for eavesdropping, thereby tainting instant orders. The People vigorously deny that the Federal eavesdropping, which terminated some five months prior to the tap which overheard the lay-off bets to "Michael" and "Tommy", can be considered the source of the latter because of the time span. The People also argue that even if the Federal tap was the source for this separate tap, the lay-off bets to "Michael" and "Tommy" were not really necessary to the probable cause here. There is merit in each of these arguments offered by the People. But the easiest answer is that the showing of necessity contained in the Federal eavesdropping applications is clearly adequate. Briefly summarized, these applications recount the limited information therefore obtained during that investigation using informants and physical surveillance, and recount in expert testimony the unlikelihood of effectively prosecuting the participants in such a large-scale telephone bookmaking operation without the use of wiretapping. These well-known difficulties are virtually a sufficient showing of necessity prima facie, "to inform the authorizing judge of the difficulties inhearing in the use of conventional techniques" (United States v. King, 335, F. Supp. 523, 535, mod. 476 p. 28, 494; of United States v. Kahn, supra). This branch of defendant's motion is therefore denied.

Requests for "minimization" and "audibility" hearings referred to in the instant motion have heretofore been referred to the trial court.

This constitutes the order and decision of the Court.

The Clerk of the Court is directed to forward a

copy of this order to the attorneys for the defendants and to the Attorney General of the State of New York

Dated: December 8, 1975

J..S. C.

APPENDIX B

SUPREME COURT NEW YORK COUNTY
TRIAL TERM PART 34

THE PEOPLE OF THE STATE OF NEW YORK

- against -

THOMAS MUSTO and MICHAEL ASTARITA,

Defendants.

Indictment No. 4072/1974

BURTON B. ROBERTS, J. :

Defendants move to reargue a motion to controvert certain eavesdropping orders and suppress evidence derived therefrom. Said motion was heretofore denied by this Court by an order dated December 8, 1975.

Upon reading the affirmation of Jeffrey A. Rabin, Esq., dated December 29, 1975, and the answering affidavit of Assistant District Attorney Harvey Weinberg, sworn to January 26, 1976, and all prior papers and proceedings had pursuant to the original motion, the motion to reargue is denied and the original decision is adhered to for the following reasons:

1. Defendants' motion papers fail to demonstrate "that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the [original] motion" (CPL § 710. 40, subd. 4).

2. Mr. Rabin's affirmation fails to contain allegations which, if true, are sufficient to carry defendants'

burden of demonstrating perjury (People v. Alfinito, 16 N. Y. 2d 181). One allegation of perjury hinges upon whether, with respect to affidavit # 73/69, the vantage point the police officers said they used afforded them a view of what they said they saw. Mr. Rabin does not dispute the officers' ability to observe, but rather implies that such observation would have been difficult but not impossible because of the angles involved. The other allegation contained in Mr. Rabin's affirmation is that an unnamed employee of the tenant of the office where the police officers purportedly made their observations would testify that such observations never took place. This allegation is so vague and the omnipresence of such an individual is so incredible that it, too, is worthless as the predicate for a hearing.

3. As this Court has previously stated, the eavesdropping order which defendants seek to controvert (#73/69) is incidental and not necessary to the probable cause for the orders which the District Attorney intends to use in this case.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to forward a copy of this order to the attorneys for the defendants and to the District Attorney of New York County.

Dated: March 3, 1976

BURTON B. ROBERTS
J.S.C.

APPENDIX C

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 31, 1977.

Present-Hon. Francis T. Murphy, Jr Justice Presiding
Samuel J. Silverman
Myles J. Lane
Paul J. Yesawich, Jr. Justices

4016

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

-against-

THOMAS MUSTO,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment

An appeal having been taken to the Court by the defendant-appellant from the judgment of the Supreme Court, New York County (B. Roberts, J.) rendered on July 28, 1976, convicting defendant, upon his plea of guilty, of promoting gambling in the first degree and promoting gambling in the second degree.

and said appeal having been argued by Mr. William Sonenshine

of counsel for the appellant, and by Mr. Brian Rosner

of counsel for the respondent ; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50 (5).

ENTER

JEROME L. REINSTEIN

Deputy Clerk

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department

APPENDIX D

STATE OFNEW YORK
COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG,
Associate Judge

THE PEOPLE OF THE STATE OF
NEW YORK,

-against -

THOMAS MUSTO and MICHAEL ASTARITA,

CERTIFICATE DENYING LEAVE

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460. 20 and upon the record and proceedings herein, [*] there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated: at New York, New York
March 16, 1976

JACOB D. FUCHSBERG
Associate Judge

[*]Description of Order: Order of App. Div. First Department entered January 31, 1977, affirming judgment of Supreme Court, New York County, rendered July 28, 1976.

APPENDIX - E

§ 710.10

MOTION TO SUPPRESS EVIDENCE DEFINITION OF TERMS

As used in this article, the following terms have the following meanings:

1. " Defendant" means a person who has been charged by an accusatory instrument with the commission of an offense.

2. "Evidence", when referring to matter in the possession of or available to a prosecutor, means any tangible property or potential testimony which may be offered in evidence in a criminal action.

3. "Potential testimony" means information or factual knowledge of a person who is or may be available as a witness.

4. "Eavesdropping" means either "wiretapping" or "mechanical overhearing of a conversation", as those terms are defined in §250.00 of the penal law.

5. "Aggrieved". An "aggrieved person" includes, but is in no wise limited to, an "aggrieved person" as defined in subdivision two of section forty-five hundred six of the civil practice law and rules.

§ 710.20

MOTION TO SUPPRESS EVIDENCE; IN GENERAL; GROUNDS FOR.

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered

against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action against such defendant; or

2. Consists of a record or potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping, obtained under circumstances precluding admissibility thereof in a criminal action against such defendant; or

3. Consists of a record or potential testimony reciting or describing a statement of such defendant involuntarily made, within the meaning of §60. 45, to a puclic servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him; or

4. Was obtained as a result of other evidence obtained in a manner described in subdivisions one, two and three; or

5. Consists of potential testimony regarding an observation of the defendant either at the time or place of commission of the offense or upon some other occasion relevant to the case, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous

identification of the defendant by the prospective witness. (Effective 2/25/76)

§ 710. 40

MOTION TO SUPPRESS EVIDENCE; WHEN MADE AND DETERMINED.

1. A motion to suppress evidence must be made after the commencement of the criminal action in which such evidence is allegedly about to be offered, and except as otherwise provided in § 710. 30 and in subdivision two of this section, it must be made within the period provided in subdivision one of section 255. 20. (Effective 9/1/74).

2. The motion may be made for the first time, when, owing to the unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable opportunity to make the motion previously, or when the evidence which he seeks to suppress is of a kind specified in § 710. 30 and he was not served by the people, as provided in said section 710. 30, with a pre-trial notice of intention to offer such evidence at the trial. (Eff. 9/1/76)

3. When the motion is made before trial, the trial may not be commenced until determination of the motion; except that in the case of a pre-trial motion made in a local criminal court, such court, must, upon request of the people, determine it during trial.

4. If after a pre-trial determination and denial of the motion the court is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, it may permit him to renew the motion

before trial or, if such was not possible owing to the time of the discovery of the alleged new facts, during trial.

§ 710.60

MOTION TO SUPPRESS EVIDENCE; PROCEDURE

1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.

2. The court must summarily grant the motion if: (a) The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or

(b) The people stipulate that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

3. The court may summarily deny the motion if:

(a). The motion papers do not allege a ground constituting legal basis for the motion; or

(b) The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision three of section 710. 20.

4. If the court does not determine the motion pursuant to subdivision 2 or 3, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath, except that unsworn evidence pursuant to subdivision 2 of § 60. 20 of this chapter may also be received. Upon such hearing, hearsay evidence is admissible to establish any material fact. (Effective 6/21/75)

5. A motion to suppress evidence made during trial may be in writing and may be litigated and determined on the basis of motion papers as provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in subdivision four, out of the presence of the jury if any, and make findings of fact essential to the determination of the motion.

6. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

CONSTITUTION OF THE U.S.

AMENDMENT [IV]

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

CONSTITUTION OF THE U.S.

AMENDMENT [XIV]

*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ***

ARTICLE I, § 6

*** No person shall be deprived of life, liberty or property without due process of law. ***

Supreme Court, U. S.
FILED
JUL 27 1977

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1784

THOMAS MUSTO and MICHAEL ASTARITA,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

On April 30, 1976, in the New York State Supreme Court, New York County, Thomas Musto and Michael Astarita each pleaded guilty to PROMOTING GAMBLING IN THE FIRST DEGREE (N.Y. Penal Law §225.10) and PROMOTING GAMBLING IN THE SECOND DEGREE (N.Y. Penal Law §225.05). On July 28, 1976, the court sentenced each petitioner to a

three-month term of imprisonment on the convictions for promoting gambling in the first degree. On the convictions for promoting gambling in the second degree, each petitioner was sentenced to a two-month term of imprisonment and fined $1,000. By orders entered on January 31, 1977, the Appellate Division, First Department, of the New York State Supreme Court unanimously affirmed these judgments without opinions. 55 A.D. 2d 894 (1st Dept. 1977). On March 16, 1977, leave to appeal the Appellate Division orders to the New York State Court of Appeals was denied. Musto and Astarita now seek a writ of certiorari to review the orders of the Appellate Division.

Introduction

Between September and December, 1973, Musto and Astarita accepted illegal wagers on sporting events. On eight days in that period, the petitioners accepted wagers in excess of $100,000. On each day between September 25th and November 3rd, the petitioners accepted wagers in excess of $5,000. In a forty-count indictment filed on August 19, 1974, Musto and Astarita were charged with one count of conspiracy to promote gambling in the first degree and thirty-nine counts of promoting gambling in the first degree. New York County Indictment No. 4072/74.

Part of the investigation in this case consisted of court-authorized electronic surveillance. New York County Eavesdropping Warrants 73/72, 73/75 and 73/79. Prior to trial, the petitioners moved to suppress the evidence derived from Eavesdropping Warrant 73/72. The petitioners alleged, *inter alia,* that the prosecutor's affidavit in

support of the warrant was based on the false statements of an undercover policeman. Without a hearing, the court (B. ROBERTS, J.) denied the motion in December 1975. In January, 1976, the petitioners again moved to suppress the evidence derived from Eavesdropping Warrant 73/72, and the court denied the motion.

On April 28, 1976, Musto and Astarita pleaded guilty to promoting gambling in the first and second degrees. On July 28, 1977, the petitioners were each sentenced to concurrent terms of imprisonment of three months and two months and fined $1,000.

On appeal to the Appellate Division of New York State Supreme Court, the petitioners asserted that it was error for the trial court to deny the first suppression motion without a hearing to determine whether Eavesdropping Warrant 73/72 was based on the false statements of an undercover police officer. Specifically, petitioners asserted that a hearing was required by New York state case law. Petitioners declined to challenge the trial court's decision to deny, without a hearing, the second suppression motion. Petitioners' brief in the Appellate Division, at 11.

The Instant Petition

Musto and Astarita ask this Court to grant a writ of certiorari to review the orders of the Appellate Division, First Department, of the New York State Supreme Court. Under New York state law, a defendant is entitled to a hearing to challenge the truthfulness of the allegations in the affidavit supporting a warrant. A hearing is required

when the defendant challenges the veracity of the affiant to the warrant. A hearing is not required when, as in the instant case, the defendant challenges the veracity of the affiant's source of information. Musto and Astarita contend that this New York rule deprives them of the hearing to which they are entitled under the Fourth and Fourteenth Amendments to the United States Constitution. It is argued that a hearing is constitutionally required whenever a defendant alleges that an affiant's source of information has lied. Petitioners' claim to this Court was not raised in the court below.

The Proceedings in the Trial Court

Eavesdropping Warrant 73/72

On September 26, 1973, the Honorable BURTON ROBERTS issued an eavesdropping warrant which authorized the District Attorney of New York County to intercept conversations transmitted over telephones with the assigned numbers 472-2990, 472-2452 and 744-2218. The telephones were located in apartment 2B at 324 East 84th Street. The authority to eavesdrop was limited to conversations pertaining to illegal gambling and to conversations in which Thomas Musto, Michael Astarita or their co-conspirators were a party (Eavesdropping Warrant 73/72). On October 10 and November 5, 1973, Justice ROBERTS renewed and amended the September warrant (Eavesdropping Warrants 73/75 and 73/79).

The basis for the original warrant, Eavesdropping Warrant 73/72, was an affidavit submitted by Assistant District Attorney Ronald Goldstock. The prosecutor stated that he

was investigating an East 84th Street bookmaking operation managed by Thomas Musto and Michael Astarita. According to the records of the New York City Police Department, Michael Astarita was a known gambler who had been arrested three times for operating a bookmaking "wireroom" in Manhattan.* Astarita's known associate was Thomas Musto, who had been arrested four times for operating wirerooms. Astarita and Musto had been arrested together twice.

The prosecutor's affidavit established probable cause to believe that Musto and Astarita were accepting wagers over telephones located at 324 East 84th Street. The prosecutor averred:

> 4. A police officer, shield #21590, who is currently acting in an undercover capacity has informed me that during the course of his official duties he has occasion to meet Michael Astarita, and has been taken into his confidence with respect to his illegal gambling activities. Astarita told the officer early in September 1973, that he (Astarita) was about to operate a wireroom using a telephonic set-up which was designed to insulate him from the action of law enforcement agencies. According to Astarita the set-up involves the use of two telephones which, while located in apartment 2B of 324 East 84th Street, New York City, are officially listed in Telephone Company records as having been installed in another premises. Thus, Astarita noted, should any investigating agency learn of numbers 472-2990 and 472-2452, that would have been given to his customers to call and place their wagers, the agency would still be unable to discover the location of the wireroom, and seize the bookmaking records. I am

* A wireroom is a bookmaking operation in which bets are accepted over telephones.

> further informed by the undercover police officer that Astarita disclosed that for bookmaking purpose, he maintained a third telephone in the wireroom (correctly listed) which would be used for outgoing calls, and the number of which would not be made available to customers (A72).*

According to the prosecutor's affidavit, subsequent investigation corroborated the information which had been supplied by the undercover police officer. The records of the New York Telephone Company indicated that telephones with the numbers 472-2990 and 472-2452 had been installed on the ground floor at 309 East 83rd Street. A telephone with the number 744-2218 had been installed in apartment 2B at 324 East 84th Street. Moreover, surveillance indicated that Musto was connected to the activity in the 84th Street apartment. Detective Richard Klev informed the prosecutor that, on September 24, 1973, Detective Klev observed Musto leave the 84th Street building at 2:06 p.m., "percisely at the close of the afternoon bookmaking hours."

Additionally, the application for Eavesdropping Warrant 73/72 was supported by an affidavit submitted by Police Sergeant Alfred Welsome. Officer Welsome stated that, pursuant to an eavesdropping warrant issued in a separate investigation, officers of the Police Department were eavesdropping on two telephones located in a 42nd Street bookmaking wireroom. On at least three occasions, clerks in the 42nd Street wireroom had called either telephone number

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* Undercover police officer shield #21590 was subsequently identified as Police Officer John Talt. At the time of his conversation with Astarita, Officer Talt had assumed the role of a fellow bookmaker. Officer Talt was still operating in an undercover capacity when Assistant District Attorney Goldstock applied for Warrant 73/72.

472-2990 or 472-2452 and placed bets. On one occasion, the clerks in the 42nd Street wireroom spoke to an individual named "Michael" and on two occasions, they spoke to "Tom."*

The Suppression Motions

Prior to trial, the petitioners moved to controvert Eavesdropping Warrant 73/72, the warrant which authorized the interception of conversations occurring over the telephones in the East 84th Street wireroom. The sole support for the motion was an affirmation signed by the petitioners' attorney. Among the reasons for controverting Warrant 73/72, the attorney alleged that Assistant District Attorney Goldstock's affidavit in support of the warrant was based, in part, on the false statements of an undercover police officer.

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* Telephone conversations originating on the telephones in the 42nd Street wireroom were intercepted pursuant to Eavesdropping Warrant 73/69. On September 18, 1973, Justice ROBERTS authorized the District Attorney of New York County to intercept conversations transmitted over telephones with the assigned numbers 594-6466 and 736-2552. The telephones were located in room 744-A at 55 West 42nd Street. The authority to intercept was limited to conversation involving illegal gambling and conversations in which Frank Reid, Bucky (LNU), Larry (LNU) or their coconspirators were a party (Eavesdropping Warrant 73/69).

Probable cause for the eavesdropping warrant was established by affidavits submitted by Sergeant Welsome, F.B.I. Agent Maurice Roussell and Assistant District Attorney Goldstock. Sergeant Welsome stated that officers under his command had, among other things, occupied a room across the street from room 744-A and made detailed observances of activity indicative of bookmaking. Agent Roussell stated that he had been told by an informant, whose previous information had resulted in twenty convictions, that the informant had recently called telephone numbers 594-6466 and 736-2552 to discuss gambling matters with Bucky (LNU) and Larry (LNU). According to Agent Roussell's affidavit, Bucky told the informant that Frank Reid was the manager of the 42nd Street wireroom. Assistant District Attorney Goldstock stated that he was in charge of the investigation of Frank Reid's gambling activities.

As previously noted, the prosecutor's affidavit contained information received from an undercover police officer. According to the prosecutor's affidavit, Astarita had told the officer, who was disguised as a fellow bookmaker, that Astarita was about to operate a wireroom in apartment 2B at 324 East 84th Street.

In the affirmation supporting the motion to suppress, the petitioners' attorney alleged that the undercover officer had lied to the prosecutor. Specifically, the attorney alleged that "the conversation that the undercover police officer related to Mr. Goldstock never did take place and that if in fact said officer did have information, it was not as a result of any conversation with Michael Astarita." The attorney described the basis for his allegation as follows: "These allegations by the undercover police officer are[,] based upon information and belief, investigation and conversations with the defendant, perjurious, in that they did not in fact take place."

On December 8, 1975, Justice ROBERTS denied the defendants' motion. Initially, the court noted "that to obtain a hearing on the issue of perjury the defense, which has the burden of proof, must allege *facts* which throw doubt on the veracity of the allegations in support of the warrant." The court then held that the affirmation of the defendants' attorney was "not a sufficient factual basis upon which to predicate a hearing." The motion to controvert Warrant 73/72 was denied.

Subsequently, the defendants again moved to controvert Warrant 73/72. The grounds asserted in that motion are not relevant to the issues in this petition. On March 3, 1976,

Justice ROBERTS denied, without a hearing, the defendants' second suppression motion. The trial court's denial of the second motion was not challenged on petitioners' appeal in the New York State courts.

POINT I

This Court has no jurisdiction to review the petitioners' claim that a hearing was required by the federal constitution.

One who petitions this Court to review the judgment of a state court must establish that the Court has jurisdiction to do so. *Street* v. *New York,* 394 U.S. 567, 581-82 (1964); *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952). Petitioners seek to invoke the jurisdiction vested in this Court by 28 U.S.C. §1257 (3). Petition at 3.* Under this provision, petitioners are required to demonstrate that the state court judgments which they ask this Court to review rested upon federal grounds. Indeed, where "it appears that the judgment [of the state court] *might* have rested on a non-federal ground," this Court has held that it has no jurisdiction. *Stembridge* v. *Georgia,* 343 U.S. at 547 (emphasis in the original). To give effect to this requirement, the rules of this Court require that one who petitions the Court for certiorari must state "the way in which [the federal questions] were passed upon by the [state] court." Supreme Court Rules, rule 23 (1) (f).

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* We presume that petitioners' reference to 28 U.S.C. §1257(2), which empowers this Court to review state court decisions by appeal, is a mistake. Petition at 3. At every other point in their petition, Musto and Astarita characterize the instant case as a petition for a writ of certiorari.

Petitioners have not, and cannot, satisfy this requirement. There is no indication that the state appellate court dealt with petitioners' federal claim. In the trial court, petitioners argued that a hearing to controvert the warrant was required by New York state case law. In the Appellate Division of the Supreme Court, petitioners argued that, by denying their motions without a hearing, the trial court had misinterpreted New York state case law. In arguing that a hearing was required, petitioners did not even refer to the federal constitution. Petitioners' brief to the Appellate Division at 4-15. In short, the federal claim which petitioners seek to raise before this Court was never presented to the Appellate Division, First Department. Therefore, this Court has no power to consider that claim. *Street* v. *New York,* 394 U.S. at 582, *supra.*

Even if the federal claim had been raised, this Court has no jurisdiction since the Appellate Division order might have rested on an independent and adequate state ground. A defendant in New York State is not automatically entitled to a suppression hearing. The defendant's motion to suppress "must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds." N.Y. Criminal Procedure Law §710.60 (1). The purpose of this rule is to effectuate New York State's interest in discouraging the waste engendered by baseless pre-trial hearings. *See generally Henry* v. *Mississippi,* 379 U.S. 443 (1965).

In the instant case, petitioners' attack on the credibility of the affiant's source of information was supported solely by an affirmation of their attorney. In an affirmation sub-

mitted in support of the motion to suppress, petitioners' counsel asserted that the "allegations by the undercover police officer are[,] based upon information and belief, investigation and conversation with the defendant, perjurious, in that they did not in fact take place." The trial court held that counsel's conclusory allegation lacked a clearly stated factual basis. Therefore, pursuant to N.Y. Criminal Procedure Law section 710.60 (1), the allegation was deemed insufficient to warrant a hearing.

Although the Appellate Division did not write an opinion, it is likely that the Appellate Division orders were based on the trial court's explicit determination that the allegation in support of petitioner's motion was too vague to require a hearing. The New York statutory provision which requires that allegations be supported by facts is distinct from the New York rule, based on case law, which requires that allegations of perjury be directed at the affiant and not at the affiant's source of information. Since the orders of the Appellate Division might have rested on a statutory provision which is not challenged in this petition, this Court has no jurisdiction to review petitioners' federal claim regarding the New York rule on perjury. *Cf. Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952).*

* Petitioners assert, however, that the trial court's determination regarding the factual sufficiency of defense counsel's allegations was wrong. Petition at 15, 16. Petitioners do not argue that N.Y. Criminal Procedure Law section 710.60 (1) violates the federal constitution by requiring that defendants make concrete factual allegations in order to be entitled to a hearing. Rather, petitioners seem to argue that the New York trial court erroneously applied New York statutory law. The mere fact that a case might have been wrongly decided is, of course, not sufficient to invoke the jurisdiction of this Court.

In any event, the trial court correctly decided that counsel's allegations were, under New York law, too vague to warrant a hearing.

(footnote continued on next page)

POINT II

The Constitution does not require a hearing when a defendant alleges that an affiant's source of information was a liar.

A New York state defendant is entitled to a hearing when he alleges that the allegations in support of a warrant are perjured. However, a hearing is required only when the defendant "attacks the veracity of the * * * affiant, and not where * * * the credibility of the source of information is challenged * * * [A hearing] is only available to the defendant who claims that the affiant has perjured himself." *People* v. *Slaughter,* 37 N.Y. 2d 596, 600 (1975); *People* v. *Glen,* 30 N.Y. 2d 252, 262, *cert. denied,* 409 U.S. 849 (1972); *People* v. *Solimine,* 18 N.Y. 2d 477, 479-80 (1966); *People* v. *Alfinito,* 16 N.Y. 2d 181, 185-86 (1965). Musto and Astarita contend that this New York rule deprives them of the full and fair hearing to which they are entitled under the Fourth and Fourteenth Amendments.

The rule of the New York Court of Appeals is similar to the rule of every federal Court of Appeals. A hearing is required when the defendant challenges the credibility of the affiant. A hearing is not required when the defendant attacks the credibility of the affiant's source of information. *See United States* v. *Belculfine,* 508 F. 2d 58, 63 (1st Cir.

As the trial court held, counsel's affirmation was "enshrouded in claims of 'information and belief' and 'investigation'." It was impossible to determine whether the allegation was based on some vague "information and belief," or an investigation (the details of which were not disclosed), or a conversation with the defendant. In short, the source of defense counsel's affirmation was deliberately obscure and, therefore, insufficient.

1974); *United States* v. *Dunnings*, 425 F. 2d 836, 839-40 (2nd Cir.), *cert. denied*, 397 U.S. 1002 (1970); *United States* v. *Armocida*, 515 F. 2d 29, 41 (3rd Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States* v. *Lee*, —— F. 2d ——, 19 CrL 2193 (4th Cir. 1976); *United States* v. *Thomas*, 489 F. 2d 664, 669-70 (5th Cir.), *cert. denied*, 423 U.S. 844 (1975); *United States* v. *Luna*, 525 F. 2d 4, 8-9 (6th Cir.), *cert. denied*, 424 U.S. 965 (1976); *United States* v. *Smith*, 499 F. 2d 251, 255 (7th Cir. 1974); *United States* v. *Marihart*, 492 F. 2d 897, 899-900 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States* v. *Prewitt*, 534 F. 2d 200, 202 (9th Cir. 1976); *United States* v. *Rael*, 467 F. 2d 333, 336 (10th Cir.), *cert. denied*, 410 U.S. 956 (1973); *United States* v. *Thornton*, 454 F. 2d 957, 967-70 (D.C. Cir. 1971).*

The reason for this rule is obvious. The narrow purpose of the exclusionary principle is to deter government officials from engaging in unreasonable searches and seizures. This purpose is not furthered by suppressing evidence merely because an informant gave false or inaccurate information to a prosecutor-affiant who had a firm basis for crediting the accuracy of both the informant and his information. *Cf. Stone* v. *Powell*, 428 U.S. 465, 486-87 (1976); *see also* Kipperman, *Inaccurate Search Warrant Affidavits*

* Where the defendant alleges that an affiant has recklessly misstated a fact, most federal Courts of Appeals have held that the defendant is entitled to a hearing. *See e.g., United States* v. *Carmichael*, 489 F. 2d 893, 988-89 (7th Cir. en banc 1973). The New York Court of Appeals has never ruled on a situation involving allegations that an affiant's statements were reckless rather than perjurious. In any event, the New York rule and the federal rule is identical regarding the issue in this petition. When a defendant alleges that a warrant was issued on the basis of perjurious or reckless statement, the defendant, in order to be entitled to a hearing, must direct his allegations at the affiant and not, as in the case at bar, at the affiant's source of information.

As A Ground For Suppressing Evidence, 84 Harvard L. Rev. 825, 830-31 (1971). To require a hearing on the facts of this case would not greatly deter unlawful government activity but would increase the number of pre-trial proceedings unrelated to the determination of guilt or innocence.

In sum, the lower courts unanimously accept the rule attacked by petitioners. The unanimous acceptance is founded on sound reasoning. Therefore, there is no reason for this Court to review this case.

Conclusion

The petition should be denied.

Respectfully submitted,

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July, 1977.